ALEXANDER STEVAS
CLERK

No. 80-1258.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

WALTER MARKHAM, ET AL.,
PETITIONERS,

v.

MIRIAM E. GELLER,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari.

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Brief in Opposition to a Petition for a Writ of Certiorari.

Reasons for Denying the Petition for Writ of Certiorari.

I. BOTH THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY APPLIED IN THE LAW GOVERNING CASES OF DISCRIMINATORY DISPARATE IMPACT IN EMPLOYMENT ACCORDING TO THE STANDARDS PREVIOUSLY ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. *The Supreme Court has Repeatedly Held that Discriminatory Motive Need Not be Established in Disparate Impact Cases Brought Under Congressional Statutes Prohibiting Discrimination in Employment.*

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977), the Supreme Court held that proof of discriminatory motive is not required to sustain a claim of disparate impact in an employment discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32

(1971). The Court distinguished the standard of proof required in a Title VII disparate impact case from that required in a case brought under the Equal Protection Clause of the Fourteenth Amendment where proof of discriminatory motive is essential. *Washington* v. *Davis*, 426 U.S. 229, 246-48 (1976).

The Supreme Court has previously held in two cases that the substantive provisions of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 626 *et seq.*, were derived *in haec verba* from Title VII. *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-56 (1979). The Court of Appeals in the instant case correctly held that the standard of proof required under the ADEA is more closely analogous to that required under Title VII than to the proof required for Equal Protection claims. This result is supported by the previous Supreme Court ADEA cases, as well as by the legislative history of the ADEA which repeatedly indicated Congress' intention to enact a 'Title VII for Age'. To manufacture distinctions between closely related Congressional statutes such as the ADEA and Title VII in the absence of Congressional intent supporting the differentiation would have been error on the part of the Court of Appeals.

The Court of Appeals was correctly following the Supreme Court's guidance in *Lorillard* v. *Pons*, *supra*, and *Oscar Mayer & Co.* v. *Evans*, *supra*, in holding that the substantive provisions of the ADEA are governed by established Title VII law and not by Equal Protection cases. Even assuming, *arguendo*, that proof of motive is not substantive but procedural, the appropriate analogy would be to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, from which the procedural provisions of the ADEA are derived and not to the Equal Protection Clause of the Fourteenth Amendment. *Lorillard* v. *Pons*, *supra* at 580. Proof of discriminatory motive is not required at all to establish a violation of the Fair Labor Standards Act.

Certiorari should be denied because there is no conflict in the Circuits on this issue, and because the Court of Appeals did not err in applying the Supreme Court's standards established in *Lorillard* v. *Pons, supra* and *Oscar Mayer & Co.* v. *Evans, supra.*

B. *Failure to Require Proof of Discriminatory Motive for the Disparate Impact Portion of this Case was Harmless Error and Would Not Affect the Actual Outcome of the Case Because Plaintiffs Below were Required to, and Did Successfully, Prove Discriminatory Motive as Part of Their Discriminatory Treatment Portion of the Instant Case.*

Plaintiffs below proceeded and prevailed on theories of both disparate impact and disparate treatment. Unlike disparate impact cases, proof of disparate treatment does require proof of discriminatory motive. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-06 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

In order to prevail on the disparate treatment theory plaintiffs were required to and did establish discriminatory motive. The jury verdict in favor of plaintiffs was based on extensive direct evidence of defendants' contemporaneous motivation for discharging Mrs. Geller in favor of a younger teacher. That evidence included testimony of the investigator from the state human rights agency regarding conversations with defendants held a few weeks after the incident, and on tape recorded conversations between Mrs. Geller and various defendants at the time the decision was made. The jury had ample evidence on which to base their verdict.

The instant case does not present a situation conducive to review of the issue of motive in a disparate impact case since plaintiffs in fact prevailed also under a disparate treatment

theory and review by this Court of the issue of motive under a disparate impact theory would not change the outcome of the case and would merely be an advisory opinion by the Court. Certiorari should not be granted on this issue.

C. *The Refusal of the Trial Court to Credit Statistical Proof was Based upon Findings of Fact Regarding the Lack of Credibility of Defendants' Statistical "Expert" and the Mathematical Incompetence of Defendants' Statistical Study which are Findings of Fact Inappropriate for Appellate Review.*

The ruling on statistical proof regarding the disparate impact theory in this case was based on the trial court's findings of credibility of the witnesses, an issue not normally reviewable on appeal. The Court has previously recognized that the usefulness of statistical proof depends on all the surrounding facts and should be left to the trial court for determination. *Hazelwood School District* v. *United States*, 433 U.S. 299, 312 (1977). Defendants offered evidence of the actual hiring pattern in an effort to rebut plaintiffs' statistical showing of discriminatory impact. The trial court's refusal to credit defendants' proof was based on three major flaws in their proof.

> The uncorroborated statistics offered in support of this (defendants') contention, however, were so defective as to justify the district court's refusal to give them any weight. They were prepared by a named defendant in the case, a former Personnel Director for the West Hartford schools who had no expertise as a statistician and had a direct interest in the outcome of the case.[1] He not only

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[1] In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 433 n.32 (1975), the Supreme Court recognized the problematic validity of statistics produced by such a source:

> failed to produce any competent evidence of the applicant pool for the periods, which is essential to a statistical determination of hiring patterns, but he employed such dubious analytical techniques as obtaining an overall percentage figure by averaging annual percentages for several different years, thus contravening the basic, well-recognized principle that such averaging by percentages produces meaningless and misleading results.

Opinion of the Court of Appeals, Appendix pages 21A-22A (footnote in original, parenthetical material added).

The court's finding that defendants' witness lacked credibility is not reviewable unless there had been abuse of discretion, which defendants here do not allege. The court's refusal to credit a hiring pattern study which fails to include competent evidence of either the applicant pool or a relevant labor pool follows the standard established by the Supreme Court in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). (Nor is plaintiff required to analyze the actual applicant pool, *Dothard* v. *Rawlinson*, 433 U.S. 321, 330-331 (1977), particularly where the data base records of actual applicant are so inaccurate and inadequate that they are not susceptible of reliable statistical analysis as was the situation in the instant case.) The court's refusal to credit a study performed by someone so abysmally ignorant of basic mathematics that he averages percentages is not the kind of error of law deserving of the Supreme Court's attention.

Defendant's claim here is that their "actual" hiring statistics rebutted plaintiffs' statistical study proving impact. The lower

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It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene-oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.

courts properly refused to credit defendants' statistics, and the issue is one of fact, not law. Nor should one Supreme Court grant certiorari to decide *if* the defendants had established competent statistical evidence of a hiring pattern, and *if* that evidence had shown no age discrimination whether that would rebut a disparate impact case. The Supreme Court does not grant certiorari to decide the outcome of hypothetical cases, and defendants are limited on appeal to the evidence actually introduced at trial. Their evidence was so defective that certiorari should not be granted.

D. *The Degree of Disparity Proved by Plaintiffs' Statistical Study was About Six Hundred (600) Times the Level Generally Required for Statistical Significance and Greatly Exceeds the Level of Statistical Significance Required by the Supreme Court in Previous Cases.*

The Supreme Court has previously affirmed findings of discriminatory impact based on statistical proof showing a level of disparity far below what was proved in this case. In *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977), the Court held that disparate impact was established where the minimum height requirement excluded 33.29%, the minimum weight requirement excluded 22.29% of the protected class. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), the high school diploma requirement excluded 34% of the protected class and was held sufficient to establish disparate impact.

The evidence of disparate impact presented at trial in the instant case far exceeds the level of impact held sufficient in *Griggs* and *Dothard*. Plaintiffs' statistical expert concluded that defendants' policy of excluding teachers with more than five years teaching experience excluded 92.6% of all teachers between 40 and 65 years old. His conclusion was that the association between age and years of experience was statistically

very significant, at about six hundred (600) times the level generally required for statistical significance. The chi square statistic, which measures the comparative exclusion between those within and outside of the protected class was 4688.3 with one degree of freedom. The Phi was .339. Plaintiffs' Exhibit 17, Table I at 4; Trans. of June 20 at 202-203 (Testimony of Dr. Alan Hunt).

Defendants did not impeach the credibility of Dr. Hunt's statistical study in any way. His qualifications were unquestioned, his data base was drawn from highly accurate fiduciary records kept by the State of Connecticut itself, and his statistical methodology was not questioned at all by defendants. As the trial court noted, plaintiffs' statistical study was "uncontraverted evidence." Opinion of the Trial Court, Appendix p. 2A.

Certiorari should not be granted to review plaintiffs' statistical proof where the level of disparity exceeds the standards previously approved in *Griggs* v. *Duke Power Co.*, *supra*, and *Dothard* v. *Rawlinson*, *supra*. Nor should certiorari be granted to allow defendants to contest for the first time on appeal evidence which was not contested at trial.

E. *Salary Cost is not a Cognizable Defense Justifying Employment Discrimination; Defendants Did Not Attempt to Introduce Evidence which Would Provide Factual Support for Such a Defense; and Plaintiffs Proved that the Bald Assertion of a Cost Defense Unsupported by any Evidence was in Fact a Pretext for Discrimination.*

Although budgetary constraints requiring that costs be cut are a widespread phenomena in contemporary society, those necessary cost cuts cannot be accomplished by excluding members of a protected class from employment. Cost cuts must be accomplished without invidious discrimination against older

workers. The Guidelines for the ADEA issued by the Secretary of Labor clearly state that generalized assertations that older workers are more costly to employ are contrary to the purposes of Congress in enacting the statute and cannot serve as a defense.

> a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(h) (1979).

Accord, *Laugeson* v. *Anaconda Co.*, 510 F.2d 307, 316 (6th Cir. 1975); *Marshall* v. *Arlene Knitwear, Inc.*, 454 F.Supp. 715, 728 and 730 (E.D. N.Y. 1978); *Coates* v. *National Cash Register Co.*, 433 F.Supp. 655, 661 (W.D. Va. 1977); *Bishop* v. *Jelleff Associates*, 398 F.Supp. 579 (D. D.C. 1974).

Unless defendants demonstrated that one of the other statutory exemptions applied, a generalized assertation of cost is not a sufficient defense. Defendants in this case have, for obvious reasons, not claimed that *less* experienced teachers are better teachers, nor have they alleged that youth is a bona fide occupational qualification for teaching. Defendants introduced no evidence whatsoever that any real or projected cost savings would result from their policy favoring younger teachers.

Furthermore, plaintiffs introduced evidence at trial that defendants already had in existence a separate policy which provided a less discriminatory alternative for achieving legitimate cost savings without any discriminatory effect on older teachers. West Hartford has had all along a second policy which provides that any teacher hired with more than nine years of experience will enter the salary schedule at the tenth step, Trans. of June 20 at 292-293 (Testimony of Personnel Director Richard Hedrick), but which does not preclude the hiring of older teachers. Where defendants have in place a mechanism for controlling costs which does not discriminate in hiring, an assertation unsupported by evidence that discrimination in hiring is required to save money constitutes a pretext for age discrimination.

Defendants cite no cases supporting their claim that cost is a legal defense to age discrimination. Certiorari should be denied on the grounds that the Court of Appeals did not err in ruling that defendants' cost defense failed both as a matter of law and because plaintiffs proved at trial that it was a pretext for age discrimination in hiring.

II. The Jury Instructions Taken as a Whole Correctly Explained the Appropriate Standard of Causation to the Jury; There is No Conflict among the Circuits; and the Jury's Verdict was Amply Supported by Evidence that the Key Factor in the Employment Decision was Illegal Age Discrimination.

The jury instructions in the instant case when taken as a whole correctly and fairly explained in some detail to the jury that defendants' policy of not hiring older teachers would be illegal only if the policy actually made a difference in defendants' decision. The trial court referred at least three separate times in the instructions to the fact that the policy had to

"make a difference", and carefully explained to the jury what this meant in terms of the actual case before the jury.

> She does not have to prove, that is Mrs. Geller doesn't, that the sixth step guideline was the only reason for the defendants' action. There could have been more than one reason for the defendants' decision about her employment, but she is nevertheless entitled to recover if one factor was her experience level and if it made a difference in determining whether she should be employed.
>
> If it did not make any difference, if it was not a reason that entered into the decision, then of course she has not proved her case. But if it did, then she has.
>
> She does not have to prove, as I said, that that was the sole reason. If it made a difference, that is the sixth step guideline, in the actual determination in this particular case, then she would be entitled to recover.

Jury Instructions, Trans. of June 22, 1979 at 630.

> So we call it a sixth step policy or guideline, but it is also related to economic savings as a guideline. Whether it was applied in this case, whether it made a difference, those are questions you are going to have to decide. Because if it did not, Mrs. Geller is not entitled to recover. Just because she is an older person does not mean she has the job. . . .
>
> So if you find by a preponderance of the evidence that one reason Mrs. Geller was not hired for a permanent teaching position was because of the sixth step guideline, then you will find that Mrs. Geller's rights under the Age Discrimination Act have been violated and that she is entitled to recover damages. If Mrs. Geller does not prove

> that that was one of the reasons, or that it made no significant difference in her not being hired, then she is not entitled to recover.

Jury Instructions, Trans. of June 22, 1979 at 632-33.

These instructions correctly applied standard of causation for ADEA cases as developed by the Sixth and First Circuits. In *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975), the court held that there could be more than one factor in the decision and that plaintiff could recover if one such factor was age and if it in fact made a difference. Accord, *Cova* v. *Coco-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). The Second Circuit in this case correctly ruled that there is no real distinction between instructing the jury that age discrimination must be shown to have 'made a difference' and instructing the jury that 'but for' age discrimination the plaintiff would have been hired. Opinion of the Second Circuit, Appendix p. 26A. Where, for example, the plaintiff is independently unqualified for the job and was also discriminated against because of age, the defendants will prevail regardless of whether the language regarding causation is couched in terms of 'but for' causation or requiring that age 'made a difference.' The plaintiff's lack of qualifications will constitute an independent intervening cause precluding a 'but for' finding. Whatever age bias there was would not have 'made a difference' in the decision because the plaintiff simply was not qualified regardless of her age. Opinion of the Trial Court, Appendix p. 9A-10A.

The jury's verdict finding that age actually made a difference in West Hartford's decision is amply supported, since defendants themselves admitted to the state human rights agency's investigator that it was "the key factor" in their refusal to hire her. Trans. of June 19, at 12-13 and 15-16. (Testimony of David Metzger). Defendants never attacked Mrs. Geller's

qualifications as a teacher, and indeed admitted that she rendered "excellent service", comparing her to a Lincoln Continental but explaining that West Hartford had to settle for a Buick. Trans. of June 21 at 482 (Testimony of defendant Dr. Johnson). Defendants admitted that the reason Mrs. Geller was not hired was because of their policy favoring younger teachers.

In the context of such substantial evidence regarding defendants' major reason for the refusal to hire, the trial court's instruction that age must be shown to have made a difference is not reversible error. Certiorari should be denied.

III. Unless There is Reversible Error of Law in Both the Disparate Impact and Disparate Treatment Theories, Certiorari Should be Denied Because the Jury's Verdict will Stand and the Court's Action will Not Affect the Actual Outcome of the Case.

The Supreme Court does not issue advisory opinions nor answer hypothetical questions. *Muskrat* v. *United States*, 219 U.S. 346 (1911). If a lower court has erred as a matter of law but the reversal of the error will not affect the actual outcome of the case, the Court should decline to exercise discretionary jurisdiction.

Plaintiffs below proceeded and prevailed at the trial and appellate levels on two separate theories of employment discrimination: disparate impact and disparate treatment. Opinion of the Second Circuit, Appendix p. 24A-25A. Because the jury's verdict is based on both theories, any reversal of error of law as to one theory only will not overturn the jury verdict. Therefore certiorari should be denied.

IV. Attorney's Fees and Costs Incurred by Opposing the Petition for Writ of Certiorari Should be Awarded under the Statutory Authority of the Age Discrimination in Employment Act of 1967.

Award of costs and attorney's fees are specifically provided by the ADEA, 29 U.S.C. § 626(b), incorporating 29 U.S.C. § 216(b). "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." The Supreme Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render (that) award unjust" where a Congressional statute provides for recovery of attorney's fees in a civil rights case. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). The same standard has been applied by the Court to recovery of costs and attorney's fees under Title VII of the 1964 Civil Rights Act. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 412 (1975). Congress has emphasized its purpose to provide for recovery of costs and attorney's fees to prevailing plaintiffs in civil rights cases (rather than establish expensive enforcement bureaucracies at taxpayer's expense) in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which was designed to achieve consistency in our civil rights laws. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976); 5 U.S. Code Cong. & Ad. News 5908.

The compelling need for award of costs and attorney's fees as part of the overall scheme of federal enforcement of these statutes has been recognized by both the Supreme Court in *Newman* and by Congress. S. Report No. 1011, 94th Cong. 2d Sess. 1 (1976); 5 U.S. Code Cong. & Ad. News at 5910. As the Senate Report recognizes, the success of a privately as opposed to publically funded enforcement scheme rests upon the

ability of litigants to attract competent counsel assured of adequate fees if they prevail. The reasons which support award of costs and attorney's fees at the trial level are perhaps even more compelling where the plaintiff has prevailed at trial and the defendants seek appellate review.

There is a very real danger that defendants' attorneys, funded by insurance policies reimbursing their costs of litigation, will attempt to wear down prevailing but indigent plaintiffs by engaging in endless costly appeals. This increase to an already overburdened federal appellate docket is unnecessary. Failure to award attorney's fees, or award of purely nominal fees, will encourage such appeals by defendants and discourage prospective plaintiff's counsel from taking such cases, thus defeating the Congressional purpose in authorizing award of attorney's fees by statute.

The denial of certiorari in this case should be accompanied by an award of actual costs and reasonable attorney's fees as provided by the ADEA. Plaintiffs have attacked as Appendix A an affidavit of the normal billing rate and actual hours expended in opposing the petition for writ of certiorari.

V. Damages Not Exceeding Ten Percent Should be Awarded under U.S. Supreme Court Rule 56 Because There is No Ground for Granting such Writ and the Petition Appears to have been Filed for Purposes of Delay.

U.S. Supreme Court Rule 56(4) provides for an award of reasonable damages for delay where a petition for a writ of certiorari has been filed and there appears no ground for granting such a writ. Where the appeal is filed primarily for purposes of delay and nothing in the record tends to show error below or rebuts the conclusion that the major purpose was delay, damages should be awarded. *Walker* v. *Dreville*, 79 U.S. 440 (1871).

Defendants in this case have attempted to appeal primarily on questions of fact unsuitable for appellate review, such as their allegations of error regarding the statistical proof. Those issues of law raised are clearly frivolous such as their claim that Constitutional standards for motivation under the Equal Protection Clause should be applied to a Congressional statute. Defendants could not in fact reasonably believe that this case is likely to be accorded Supreme Court review.

A real injury to plaintiffs for delay in this case is because the statutory interest rate provided for judgments pending appeal is only eight percent, and defendants obviously gain an economic advantage in delaying the day of payment as long as possible. To permit utilization of the appellate dockets to avoid payment and for defendants to benefit from unreasonably low interest rates is not in the interests of either the federal judiciary or plaintiffs. Reasonable damages should be awarded to remove the economic advantage defendants have received as a result of the delay during the process of seeking certiorari.

Summary.

This case is not suitable for Supreme Court review because many of the allegations of error are really challenging findings of fact at the trial level, including defendants major contention regarding the statistical proof of disparate impact, the proof that the cost defense was in fact a pretext for age discrimination, and the jury verdict that age bias was the determining factor causing defendants to refuse employment to plaintiff. Of the three arguable errors of law, one is clearly frivolous. Defendants' contention that Equal Protection motivation standards should be applied to the ADEA has no basis whatever in law, defendants cite no cases supporting this

proposition and it contradicts previous Supreme Court decisions. The second, defendants' contention that cost is a defense, has never been accepted by any court and defendants cite no cases in support of this proposition. Furthermore, evidence was introduced proving that cost was a pretext for age discrimination and the jury's verdict in favor of plaintiff constitutes a factual determination unsuited for appellate review. The third, defendants allegation of error in charging the jury on causation does not in fact present a situation where the Circuit Courts are in conflict and the jury verdict was amply supported by evidence showing the real reason defendants refused to hire plaintiff was their illegal policy of age discrimination. Finally, unless there is reversible error in both the disparate impact and disparate treatment portions of the case, certiorari should be denied because Supreme Court review will not affect the actual outcome of the case.

Plaintiffs seek award of costs and attorney's fees for opposing the petition for writ of certiorari as provided by the ADEA which should be awarded to further Congress' purpose in establishing a scheme of private enforcement. Plaintiffs also seek damages under U.S. Supreme Court Rule 56 to prevent defendants from receiving unfair economic benefit from filing a petition for purposes of delay.

Respectfully submitted,

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February 16, 1981.

Appendix A.

Affidavit of Attorney's Fees.

In accordance with the statutory provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) incorporating 29 U.S.C. § 216(b), authorizing award of attorney's fees to prevailing plaintiffs, the actual number of hours expended by plaintiffs' attorneys in opposing the petition for writ of certiorari are as follows:

Elizabeth K. Spahn	19 hrs. @ $75.00/hr.	$ 1,425.00
Gary J. Mena	2 hrs. @ $50.00/hr.	100.00
	TOTAL	$ 1,525.00

I hereby certify that the foregoing is a true and accurate representation of normal billing rates and actual time expended in opposing the petition for certiorari.

Respectfully submitted,

Date: February 16, 1981

s/_____

Elizabeth K. Spahn,
Attorney for Plaintiff